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Attorneys for Third Parties
THEODORE KRAMER and
THOMAS SCARAMELLINO

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN MATEO

Six4Three, LLC, a Delaware limited liability
company,

Plaintiff;

v.

Facebook, Inc., a Delaware corporation;
Mark Zuckerberg, an individual;
Christopher Cox, an individual; **Javier
Olivan**, an individual; **Samuel Lessin**, an
individual; **Michael Vernal**, an individual;
Ilya Sukhar, an individual; and **Does 1-50**,
inclusive,

Defendants.

FILED
SAN MATEO COUNTY

APR 15 2019


CLERK OF SUPERIOR COURT

CLERK

Case No. CIV533328

Assigned for all purposes to Hon. V.
Raymond Swope, Dep't 23

**THIRD PARTY THEODORE KRAMER AND
THOMAS SCARAMELLINO'S OPPOSITION TO
DEFENDANT FACEBOOK, INC.'S SECOND
IMPROPER MOTION FOR RECONSIDERATION
TO OPEN DISCOVERY**

CIV533328
MPAO
Memorandum of Points and Authorities in Opp:
1766067


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SUPERIOR COURT
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CLERK OF COURT

INTRODUCTION

How is the ordinary or even extraordinary exercise of one's First Amendment rights, explicitly and recently affirmed by this Court, cause for an *ex parte* proceeding or rewriting the CCP rules or invading the privacy of third parties without due process or even a reasonable process on reasonable notice?

Lastly, the Court is unclear of the basis upon Which Mr. Scaramellino has "been prohibited from communicating with the media and government officials regarding Six4Three's case against Facebook in Violation of my First Amendment rights under the United States Constitution." (Scaramellino Dec., ¶ 13(g).) **No gag order has been issued by this Court.** This, however, does not obviate the obligations and responsibilities of the parties, counsel, consultants and legal staff, including Mr. Scaramellino, agreed to under the Stipulated Protective Order, issued October 24, 2016.

Order on Birnbaum & Godkin, LLP's Ex Parte Application for Order Rescheduling Hearing, entered on February 8, 2019, p. 2, lns. 14-20 (emphasis added).

Disregarding of the First Amendment, and ignoring the supervised transfer and destruction of all documents held by Third Parties Kramer and Scaramellino, Defendant Facebook, Inc. ("Facebook") demands a deposition or in-court examination of them based on emails submitted in their entirety under seal without basis that disprove Facebook's own argument. This *ex parte* is nothing more than an attempt to punish Ted Kramer and Tom Scaramellino for the exercise of their rights under the U.S. and California Constitutions, something this Court affirmed they have the right to do. This Court should uphold the U.S. and California Constitutions and deny a punitive, retaliatory, baseless *ex parte* application on nearly no real notice.

ARGUMENT

I. THE EMAILS FROM THE "BROADCAST NETWORK" DEFEAT FACEBOOK'S REQUEST.

It is undeniable that Third Parties Kramer and Scaramellino have a First Amendment right to communicate with the press regarding themselves and public court filings. See e.g. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576, 578 (1980) (lead opn. of Burger, J.).

1 [REDACTED]
2 [REDACTED]
3 Abramson Decl., Exh. 2 (emphasis added).¹ This is consistent with what Mr. Kramer was told.
4 Kramer Decl., ¶¶5-7; see also Scaramellino Decl., ¶9.

5 How does Facebook go from an email saying Ted Kramer and Tom Scaramellino [REDACTED]
6 [REDACTED] to a need for an emergency deposition?
7 Facebook attempts to use innuendo regarding a "[REDACTED]" to impute there has been some
8 further disclosure or "leak" by Third Parties without any evidence or even logical support.
9

10 The evidence, long before this Court, is quite the opposite. Third Parties Scaramellino
11 and Kramer destroyed all documents and information, as ordered by this Court, under the
12 supervision of Facebook's expert. Scaramellino Decl., ¶8; Kramer Decl., ¶4. They have already
13 submitted declarations about their lack of contacts with other purported "leakers." Declaration of
14 Thomas Scaramellino in Support of Opposition to Defendant Facebook, Inc.'s Second Improper
15 Motion for Reconsideration to Open Discovery, filed on February 28, 2019, ¶¶2-4, Declaration
16 of Theodore Kramer in Support of Opposition to Defendant Facebook, Inc.'s Second Improper
17 Motion for Reconsideration to Open Discovery, filed on February 28, 2019, ¶4; see also Kramer
18 Decl., ¶¶2-3; Scaramellino Decl., ¶¶2-3.

19 Finally, Mr. Scaramellino has medical issues that prevent him from being able to travel
20 for a deposition or court hearing. Scaramellino Decl., ¶7.

21 This *ex parte* is not about some new "leak", it is about Facebook's desire to punish Third
22 Parties Kramer and Scaramellino for exercising their First Amendment rights and to try and "get
23 ahead" of a story that seems likely to paint Facebook in a bad light. That is not "good cause"
24 under the Discovery Act, let alone for an evidentiary hearing and, indeed, runs contrary to
25 fundamental principles of justice and freedom of speech. It must be denied and rejected.
26

27 ¹ There is no basis for the sealing of this exhibit, nor is any provided by Facebook's motion to
28 seal, as discussed in our opposition to the motion to seal submitted concurrently with this
Opposition. We are lodging these portions of our Opposition under seal under protest.

1 **II. FACEBOOK GROSSLY MISREPRESENTS THE “SEARCH” IT SEEKS**
2 **FROM A FORENSICS EXAMINER AND REQUESTS AN UNJUST PROCESS.**

3 Under Article I, Section 1 of the California Constitution, Third Parties Kramer and
4 Scaramellino have a right of privacy. See Valley Bank of Nev. v. Super. Ct., 15 Cal. 3d 652, 656
5 (1975); Life Techs. Corp. v. Super. Ct., 197 Cal.App.4th 640, 655 (2011) (*disapproved on other*
6 *grounds in Williams v. Super. Ct.*, 3 Cal. 5th 531, 557 & n.8 (2017).) The right of privacy
7 “protects the individual’s reasonable expectation of privacy against a serious invasion,” which
8 this would be given the time and potential number of nonparties and privacy interests affected.
9 Pioneer Electrs. (USA), Inc. v. Super. Ct., 40 Cal. 4th 360, 370 (2007).

10 The prior orders of this Court required preservation of **all** of their data, including
11 personal, private and privileged information (including privilege that belongs to third parties
12 wholly unrelated to this dispute, Facebook or 643). Declaration of Thomas Scaramellino in
13 Support of Theodore Kramer and Thomas Scaramellino’s Opposition and Response to Defendant
14 Facebook, Inc.’s *Ex Parte* Application, filed on December 5, 2019, ¶2; Declaration of Theodore
15 Kramer in Support of Theodore Kramer and Thomas Scaramellino’s Opposition and Response to
16 Defendant Facebook, Inc.’s *Ex Parte* Application, filed on December 5, 2019, ¶9.

17 Contrary to what is asserted in the Application, Facebook is not requesting a search for
18 just email domains or with third parties. The exhibit attached to Mr. Abramson’s declaration
19 contains a list of search terms, few of which are actual domains. For example, the list includes
20 “fortune,” “wired” and “observer,” which are not just the names of magazines and newspapers,
21 but also ordinary English words that could come up in any number of contexts. Abramson Decl.,
22 Exh. 3. Other examples, if somewhat less common words, include “guardian,” “fox,” “verge,”
23 “telegraph,” “Carole,” “parliament,” “Collins,” and “willows.” *Id.*

24 Additionally, Facebook broadly requests “communications” not just emails, further
25 proving the falsity of their assertion that they just want searches of “third-party email domains.”

26 Facebook misrepresented **to this Court** the discovery is it asking for to conceal the
27 impermissible breadth of their requests. That request must be rejected.

28 Facebook also asked for the documents to be produced directly to Facebook by the
forensics expert without any review by any counsel for Plaintiff or for Third Parties Kramer and

1 Scaramellino. No documents from personal repositories should be turned over to Facebook
2 without review first to ensure there are no violations of privacy rights, privilege of unrelated
3 parties, etc.

4 CONCLUSION

5 Facebook's *ex parte* application violates the First Amendment of the U.S. Constitution,
6 violates free speech and privacy rights of the California Constitution, and makes
7 misrepresentations to his Court regarding the scope of its request. It must be denied. No
8 depositions and no other discovery should occur unless or until a proper contempt proceeding is
9 initiated as required by applicable law. See Koehler v. Superior Court, 181 Cal.App.4th 1153,
10 1169-1171 (2010).

11
12
13 Dated: April 12, 2019

Respectfully submitted,
COMPUTERLAW GROUP LLP

14 By: Jack Russo
15 Jack Russo
16 Attorneys for Third Parties
17 THEODORE KRAMER and
18 THOMAS SCARAMELLINO
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